RECEIVED
NOV 24 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

STATE OF ARKANSAS,
Petitioner

vs.

WILLIAM THOMAS HAYNES,
Respondent

No. 80-691

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The respondent, by his attorney, Jackson Jones, Deputy State Appellate Defender, hereby moves that he be allowed to proceed in forma pauperis in this Court for the reasons set out in the affidavit accompanying this motion.

The respondent proceeded in forma pauperis in the trial court and on appeal to the Arkansas Supreme Court.

Respectfully submitted,

JACKSON JONES
Deputy State Appellate Defender
1515 Building, Suite 714
Little Rock, Arkansas 72202
(501) 370-5515

Attorney for Respondent

CERTIFICATE OF SERVICE

I, Jackson Jones, hereby certify that a copy of the foregoing motion for leave to proceed in forma pauperis was hand-delivered to Victra L. Fewell, Assistant Attorney General of Arkansas, one of the attorneys for the petitioner, at her office in the Justice Building, Little Rock, Arkansas, on this 21st day of November, 1980.

JACKSON JONES

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF ARKANSAS,
Petitioner

vs.

WILLIAM THOMAS HAYNES,
Respondent

No. 80-691

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED
IN FORMA PAUPERIS

I, William Thomas Haynes, being first duly sworn, depose and say that I am the respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, or comply with this Court's printing requirements, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present in my response to the petition for writ of certiorari are the following: the decision of the Arkansas Supreme Court in the above-entitled case was correct; even if there was a federal question involved in this case which was wrongly decided, the judgment of the Arkansas Supreme Court was based upon an adequate and independent nonfederal or state ground.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of responding to the State's petition for writ of certiorari, and for briefing the case on the merits if required, are true.

1. Are you presently employed? NO

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.
   MAY 13, 1978

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? NO

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? NO

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I proceeded in forma pauperis in the state trial court and on appeal to the Arkansas Supreme Court.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

William T. Haynes
WILLIAM THOMAS HAYNES

STATE OF ARKANSAS)
)
COUNTY OF LINCOLN)

SUBSCRIBED AND SWORN TO before me this 21 day of November, 1980.

NOTARY PUBLIC

My Commission Expires:

[illegible] 10 11-81

CERTIFICATE OF MAILING

I, Jackson Murry Jones, am a member in good standing of the Bar of this Court. I hereby state pursuant to Rule 28 of the Rules of the Supreme Court that the requisite number of copies of the respondent's brief in opposition to petition for writ of certiorari (No. 80-691) was placed in the United States mail, postage prepaid (first class), addressed to the Clerk of the Supreme Court of the United States, Washington, D.C. 20543, on the 21st day of November, 1980. The brief is due to be filed on November 23, 1980.

Jackson Jones
JACKSON JONES

STATE OF ARKANSAS)
)
COUNTY OF PULASKI)

Sworn to and subscribed before me this 21st day of November, 1980.

Sherry Brannon
NOTARY PUBLIC

My Commission Expires:

8-1-81

CERTIFICATE OF SERVICE

I, Jackson Murry Jones, Deputy State Appellate Defender, hereby certify that a copy of the foregoing brief in opposition to petition for writ of certiorari (No. 80-691) was hand-delivered to Victra L. Fewell, Assistant Attorney General of Arkansas, one of the attorneys for the petitioner, Justice Building, Little Rock, Arkansas, on this 21st day of November, 1980.

Jackson Jones
JACKSON JONES

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

STATE OF ARKANSAS — PETITIONER

VS.

NO. 80-691

WILLIAM THOMAS HAYNES — RESPONDENT

BRIEF IN OPPOSITION
TO
PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

E. ALVIN SCHAY
State Appellate Defender

JACKSON JONES
Deputy State Appellate Defender
1515 Building, Suite 714
Little Rock, Arkansas 72202
(501) 370-5515

ATTORNEYS FOR RESPONDENT

QUESTION PRESENTED FOR REVIEW

Whether the Arkansas Supreme Court erroneously reversed the respondent's conviction because of the introduction of evidence seized from the respondent's apartment several hours after police officers had made a warrantless and non-consensual intrusion into the apartment under non-exigent circumstances and seized, or "secured", the apartment and the persons (respondent and his father) therein while other officers applied for and obtained a search warrant.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	iv
JURISDICTION	iv
CONSTITUTIONAL PROVISIONS AND RULES	iv
STATEMENT OF THE CASE	vi
ARGUMENT	1
CONCLUSION	4

TABLE OF AUTHORITIES

CASES: Page

Berea College v. Kentucky, 211 U.S. 45 (1908) 1

Chambers v. Maroney, 399 U.S. 42 (1970) 3

Fox Film Corp. v. Muller, 296 U.S. 207 (1935) 1

Haynes v. State, 269 Ark. ____, 602 S.W.2d 599 (1980) iv

Murdock v. City of Memphis, 20 Wall. 590 (1875) 1

Payton v. New York, ____ U.S. ____ (April 15, 1980) 1

Texas v. White, 423 U.S. 67 (1975) 3

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES:

Constitution of the United States, Amendment IV iv

Constitution of the United States, Amendment XIV iv

Constitution of Arkansas, Article 2, Section 15 iv

28 U.S.C. Sec. 1257(3) iv

Arkansas Rules of Criminal Procedure, Rule 10.1(a) . . . . iv, 1, 2

Arkansas Rules of Criminal Procedure, Rule 13.2(c) . . . . . v, 3

Arkansas Rules of Criminal Procedure, Rule 14.3 . . . . . v, 1, 2, 3

Arkansas Rules of Criminal Procedure, Rule 16.2(e) . . . . . v, 2

OPINIONS BELOW

Haynes v. State, 269 Ark. ____, 602 S.W.2d 599 (1980)

JURISDICTION

28 U.S.C. Sec. 1257(3)

CONSTITUTIONAL PROVISIONS AND RULES

Constitution of the United States, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States, Amendment XIV:

(N)or shall any state deprive any person of life, liberty, or property, without due process of law . . . .

Constitution of Arkansas, Article 2, Section 15:

The right of the people of this State to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized.

Arkansas Rules of Criminal Procedure (Ark. Stat. Ann. Vol. 4A), Rule 10.1(a):

"Search" means any intrusion other than an arrest, by an officer under color of authority, upon an individual's person, property, or privacy, for the purpose of seizing individuals or things or obtaining information by inspection or surveillance, if such intrusion, in the absence of legal authority or sufficient consent, would be a civil wrong, criminal offense, or violation of the individual's rights under the Constitution of the United States or this state.

Arkansas Rules of Criminal Procedure (Ark. Stat. Ann. Vol. 4A), Rule 13.2(c):

Except as hereafter provided, the search warrant shall provide that it be executed between the hours of six a.m. and eight p.m., and within a reasonable time, not to exceed sixty (60) days. Upon a finding by the issuing judicial officer of reasonable cause to believe that:

(i) the place to be searched is difficult of speedy access; or

(ii) the objects to be seized are in danger of imminent removal; or

(iii) the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy;

the issuing judicial officer may, by appropriate provision in the warrant, authorize its execution at any time, day or night, and within a reasonable time not to exceed sixty (60) days from the date of issuance.

Arkansas Rules of Criminal Procedure (Ark. Stat. Ann. Vol. 4A), Rule 14.3:

An officer who has reasonable cause to believe that premises or a vehicle contain:

(a) individuals in imminent danger of death or serious bodily harm; or

(b) things imminently likely to burn, explode, or otherwise cause death, serious bodily harm, or substantial destruction of property; or

(c) things subject to seizure which will cause or be used to cause death or serious bodily harm if their seizure is delayed;

may, without a search warrant, enter and search such premises and vehicles, and the persons therein, to the extent reasonably necessary for the prevention of such death, bodily harm, or destruction.

Arkansas Rules of Criminal Procedure (Ark. Stat. Ann. Vol. 4A), Rule 16.2(e):

. . . A motion to suppress evidence shall be granted only if the court finds that the violation upon which it is based was substantial, or if otherwise required by the Constitution of the United States or of this state. In determining whether a violation is substantial the court shall consider all the circumstances, including:

(i) the importance of the particular interest violated;

(ii) the extent of deviation from lawful conduct;

(iii) the extent to which the violation was willful;

(iv) the extent to which privacy was invaded;

F

(v) the extent to which exclusion will tend to prevent violations of these rules;

(vi) whether, but for the violation, the things seized would have been discovered; and

(vii) the extent to which the violation prejudiced the moving party's ability to support his motion, or to defend himself in the proceedings in which the things seized are sought to be offered in evidence against him.

STATEMENT OF THE CASE

The respondent was charged with delivery of LSD, possession of LSD with intent to deliver, and possession of marijuana, all in violation of Ark. Stat. Ann. Sections 82-2601 et seq. (Repl. 1976). Prior to his trial, the respondent filed a motion to suppress evidence (marijuana, LSD, and "marked" money) seized from his apartment on the ground of unlawful search and seizure; after a hearing the motion was denied. On appeal, the Arkansas Supreme Court ruled that the evidence should have been suppressed; therefore, the respondent's convictions were reversed and the case was remanded for a new trial.

The underlying facts may be briefly summarized as follows:

In April 1978 the respondent was living with his father in a room at a motel in Harrison, Arkansas. On April 22, the police received information from an informant concerning the respondent which led the police to place his room under surveillance. (T. 155) The surveillance was continued on April 23. On that date the informant was given "marked" money by the police with which to make a "controlled buy" of drugs from the respondent. The informant was not successful in making the purchase at that time. (T. 157) Later during the evening of April 23, a second informant was given $5.00 in "marked" money with which to make a "controlled buy" from the respondent at the motel (T. 122), and he allegedly did so, at approximately 11:00 p.m., while the police continued to watch the respondent's room. (T. 85) After the "controlled buy" was allegedly made, some of the officers involved in the investigation began the process of applying for a warrant, while another officer, Officer Hutchinson, acting pursuant to his independent judgment,

immediately went to the respondent's room, entered it without the consent of the respondent or his father, who were in the room, and, together with other officers, occupied it until the warrant arrived approximately 3 1/2 hours later. (T. 86, 89, 95, 128) The respondent testified that when Officer Hutchinson entered his room without a warrant he asked him to leave (T. 70), and this testimony was uncontradicted. In fact, the officer admitted that he did not receive permission to enter the room. (T. 94-95, 99; see also T. 56,74) The officer's purpose in entering the room was, in his words, to "seize the room" until an anticipated search warrant arrived. (T. 198) A full-scale search was not conducted until the warrant arrived; however, the officers' occupation of the room before the search warrant was obtained was not entirely passive. The respondent testified that one of the officers, without consent, seized a cannister containing marijuana from a dresser drawer prior to the time the warrant arrived. (T. 73-74) The officer denied that he took the cannister from the drawer and stated that the respondent had given it to him (T. 126), but the officer's own account of the incident reveals that the marijuana was discovered as a result of persistent and impermissible questioning by the officer. The following is a portion of the officer's testimony:

> Q. After you read him his rights, did he make any statement or volunteer any information?
>
> A. Yes, he did.
>
> Q. And how did that come about?
>
> A. I asked him about drugs and he kept saying I don't know what you are talking about and finally he said "Post, all I have is in that dresser drawer," and he went to the dresser drawer and got it out and it was marijuana. (T. 125)

Approximately six ounces of marijuana, 21 "hits" of LSD (approximately 609 micrograms), and the "marked" money used by the informant to make the "controlled buy" were seized from the respondent's apartment and introduced into evidence at his trial over his continuing objections. At the conclusion of the trial, the jury found the respondent guilty as charged and fixed his punishment as follows: for possession of marijuana, 1 year's imprisonment in the county jail and a fine of $1,000.00; for delivery of LSD, 20 years' imprisonment in the state penitentiary and a fine of $15,000.00; for possession of LSD with intent to deliver, 20 years' imprisonment in the state penitentiary and a fine of $15,000.00. The trial court ordered that the two 20-year terms of imprisonment be served consecutively.

ARGUMENT

The respondent submits that this case is not one which requires the exercise of this Court's extraordinary and discretionary jurisdiction. The judgment of the Arkansas Supreme Court is correct on the basis of settled constitutional principles announced by this Court. Furthermore, the judgment can be sustained on independent grounds of state law, and thus a review of the judgment on writ of certiorari is inappropriate. Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); Berea College v. Kentucky, 211 U.S. 45, 53 (1908); Murdock v. City of Memphis, 20 Wall. 590, 636 (1875).

The ruling of the Arkansas Supreme Court in this case is unexceptionable: police officers in this state will not intrude into a person's home without a warrant for the purpose of searching for or seizing persons or things, unless a true emergency exists. Arkansas Rules of Criminal Procedure, Rule 10.1 and Rule 14.3; Payton v. New York, ___ U.S. ___ (April 15, 1980).

Rule 10.1 of the Rules of Criminal Procedure defines a "search" as

> any intrusion other than an arrest, by an officer under color of authority, upon an individual's person, property, or privacy, for the purpose of seizing individuals or things or obtaining information by inspection or surveillance, if such intrusion, in the absence of legal authority or sufficient consent, would be a civil wrong, criminal offense, or violation of the individual's rights under the Constitution of the United States or this state.

According to the Commentary to Rule 10.1, the key word in this definition is "intrusion," which is "a term sufficiently broad to encompass any legally cognizable interference with an individual's right to privacy."

Under Rule 10.1, the "search" of the respondent's room actually began when Officer Hutchinson first entered the room -- i.e., when he intruded upon the respondent's property and privacy -- with the ultimate intention of seizing persons or things found there. In the absence of exigent circumstances, the search of the respondent's room was therefore illegal in its inception and could not be transformed into a legal search by the belated production of a warrant.

Rule 14.3 of the Rules of Criminal Procedure authorizes "emergency searches" when exigent circumstances exist:

-1-

An officer who has reasonable cause to believe that premises or a vehicle contain:

(a) individuals in imminent danger of death or serious bodily harm; or

(b) things imminently likely to burn, explode, or otherwise cause death, serious bodily harm, or substantial destruction of property; or

(c) things subject to seizure which will cause or be used to cause death or serious bodily harm if their seizure is delayed;

may, without a search warrant, enter and search such premises and vehicles, and the persons therein, to the extent necessary for the prevention of such death, bodily harm or destruction.

The Arkansas Supreme Court correctly found that an emergency, within the meaning of Rule 14.3, did not exist in this case. There was certainly no evidence that the respondent's room contained individuals in danger of death or serious bodily harm; or things likely to burn or explode; or things subject to seizure which would cause or be used to cause death or serious bodily harm if their seizure were delayed. There was even no evidence that the respondent knew that his residence was under surveillance by the police officers, and thus there was no danger that he would feel compelled to destroy any evidence while the officers applied for a warrant.

It is clear that Officer Hutchinson's purpose in entering the respondent's room was not to effect a routine felony arrest culminating in the immediate removal of the arrestee to a police station; his admitted purpose, as noted in the Arkansas Supreme Court's opinion, was to "seize the room" until an anticipated search warrant arrived. Even if the Arkansas Supreme Court had found, however, that the entry of the respondent's room by Officer Hutchinson was for the purpose of making an arrest and was not the initiation of a "search" within the meaning of Rule 10.1, the entry was nevertheless unlawful, inasmuch as it involved a warrantless intrusion into the appellant's home in the absence of exigent circumstances, Payton v. New York, supra, and the court was justified in applying the exclusionary rule in this case to deter such illegal entries into homes as occurred here. Rule 16.2(e) of the Rules of Criminal Procedure provides that, in determining whether a motion to suppress evidence should be granted, the state courts must consider, inter alia, (1) the importance of the particular interest violated; (2) the extent of deviation from lawful conduct; (3) the extent to which privacy was violated; and (4) the extent to which exclusion will tend to prevent violations of these rules.

The Arkansas Supreme Court held that "seizing the room" in this case 3 1/2 hours before a search warrant was obtained was "as much of an invasion of privacy as searching the room." This ruling is analogous to and consistent with this Court's ruling in Chambers v. Maroney, 399 U.S. 42 (1970), that the intrusion involved in initially seizing a car on the highway and holding it for the short time required to seek a warrant is so substantial as to be constitutionally indistinguishable from the intrusion involved in a subsequent search of the vehicle. "(T)he basic premise of Chambers' conclusion that seizures pending the seeking of a warrant are not constitutionally preferred to warrantless searches was that temporary seizures are themselves intrusive." Texas v. White, 423 U.S. 67, 71-72 (1975)(Mr. Justice Marshall, dissenting) (emphasis added).

If an emergency exists, no warrant is required before police officers may enter a person's home for the purpose of conducting a search or seizure. Arkansas Rules of Criminal Procedure, Rule 14.3. If, however, no such emergency exists, as it clearly did not in this case, police officers are not authorized to commit the kind of intrusion and invasion of privacy that occurred here without a prior showing of reasonable cause to a judicial officer and the issuance of a warrant. And even then, i.e., after the warrant has been issued, a nighttime intrusion such as occurred in this case is not allowed in this state unless the issuing judicial officer finds a special need for it. Arkansas Rules of Criminal Procedure, Rule 13.2. In this regard, although a Rule 13.2 issue was not raised in the trial court and thus was not discussed in the respondent's brief on appeal to the Arkansas Supreme Court, it is noteworthy that in the "Affidavit for Search Warrant" in this case one of the reasons given for the necessity of the immediate issuance and execution of a search warrant was that police officers had already "secure(d) the premises and persons involved" and were "presently awaiting a search warrant." (T. 19) The respondent submits that, if the issue were properly presented to it, the Arkansas Supreme Court would surely hold that our Rules of Criminal Procedure were not intended to sanction any attempt by police officers to receive judicial approval of a continuing intrusion by showing that the intrusion had already been initiated by them.

Police authorities in this state have been put on notice by the Arkansas Supreme Court that the highly intrusive "securing" (i.e., seizing) of a home in a non-emergency situation while application for a search warrant is being made will not be tolerated. The respondent respectfully submits that this ruling should be allowed to stand.

CONCLUSION

For the foregoing reasons, the respondent asks that the petition for a writ of certiorari be denied.

Respectfully submitted,

E. ALVIN SCHAY
State Appellate Defender

JACKSON JONES
Deputy State Appellate Defender
1515 Building, Suite 714
Little Rock, Arkansas 72202
(501) 370-5515

ATTORNEYS FOR RESPONDENT